SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 439

HAROLD VAN EATON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

John S. Wise, Jr.,
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INDEX.

Table of Cases Cited.

	Page
Berman v. *United States*, 302 U. S. 211	6
Birnbaum v. *United States*, 107 F. (2d) 885	2
Burns v. *United States*, 287 U. S. 216	9
Lange, Ex parte, 18 Wall. 163	2, 9
United States v. *Moore*, 101 F. (2d) 56	5

Statutes Cited.

Probation Act, Section 2 (18 U. S. C. 725)	3
18 U. S. C. 232	9

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This Honorable Court denied certiorari herein on November 12, 1940, and rehearing is respectfully prayed for because the decision below, unless rationalized by this Court, will stand as authority for the proposition that a District Court may issue a warrant and arrest a former probationer for alleged probation violation, not crime, after he has fully served the maximum five year period of probation permitted by the Probation Act; after the expiration of the imposed, concurrent five year sentence, execution of which was suspended; after he has been duly discharged from said probation and sentence by its formal order on notice and argument; and after the time to appeal said order of discharge has passed and it has become res judicata. If this be law, then no order of a District Court in

any proceeding, under the Probation Act or otherwise, can have any degree of finality or afford one whit of protection to any litigant.

This petitioner had an honorable career as a lawyer for more than a quarter century, and was a veteran of the World War, prior to his conviction in 1932. Since his release in August, 1933 he never has been charged, indicted or convicted of a crime, and has tried to rehabilitate himself.

The original judgment and sentence herein was imposed by His Honor, Judge Knox, June 30, 1932 under Indictment C-88/665:

> "Count one to eight inclusive—Three years to run concurrently. Count 17—Two years to run concurrently with counts one to eight inc.
>
> "Counts nine to sixteen—Five years on each count to run concurrently and to commence at the expiration of sentences imposed on counts 1 to 8 inc. and 17. Sentence on counts 9 to 16 inc. suspended.
>
> "Deft. placed on probation for a period of five years.
>
> "Sentence to date from June 30, 1932."

Defendant was immediately incarcerated on June 30, 1932 and thereafter the term of court was never extended. The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it. *Ex parte* Lange, 18 Wall. 163.

As recently as December 2, 1939 the Fourth Circuit Court of Appeals, in *Birnbaum* v. *U. S.*, 107 F. (2d) 885, 886, resting squarely upon recent decisions of this Honorable Court, held:

> "(1, 2) An order suspending sentence and releasing a prisoner on probation is in no sense a final decision. It is a mere deferring of sentence, which in a criminal case is the final judgment. 'Final judgment in a criminal case means sentence.' Berman *v.* United

> States, 302 U. S. 211, 212, * * * Miller *v.* Aderhold, 288 U. S. 206, 210, * * *. When the sentence is imposed and merely its execution suspended, there is *a final judgment not subject to change by the court;* and appeal will thereupon lie, Berman *v.* United States, *supra.* But *until sentence is imposed,* the whole matter of punishment rests in the court's discretion. * * *'' (our italics).

Therefore, on June 30, 1932, petitioner was told, in effect, that he would have to serve the three year sentence, that if he behaved himself for five years thereafter, the maximum period of probation permitted by the Probation Act, he would never have to serve the consecutive five year sentence then and there imposed with execution suspended, and that after completing said probation he could freely mingle with his fellow-men and, like them, be subject only to the laws of society, not the rules of probation, in his struggle for livelihood.

Petitioner was incarcerated under that three year sentence from June 30, 1932, until August 29, 1933, when he was released on a parole which he creditably performed.

In April, 1937, a probation revocation proceeding was instituted against petitioner before His Honor, Judge Hulbert, who later revoked probation, but petitioner's appeal therefrom resulted in an adjudication in his favor, on the merits and facts, by the Second Circuit Court of Appeals, 99 F. (2d) 816, November 7, 1938, and the Government did not apply for certiorari.

In March, 1939, both said period of probation and the period of the imposed concurrent five year sentence, execution of which had been suspended, having previously terminated, petitioner, on affidavit and notice to respondent, duly moved the District Court to exercise its authority under the first paragraph of Section 2 of the Probation Act (18 U. S. C. 725) and make an order formally discharging peti-

tioner from probation, (R. 13-19), and respondent filed an answering affidavit (R. 19). Thereafter said motion was argued orally before Judge Hulbert, who, on March 28, 1939, rendered a memorandum opinion (R. 23):

> "Having previously determined that defendant's parole would expire August 29, 1938, and adding thereto the period that the stay granted by the Circuit Court of Appeals was effective, the probationary period has terminated and the motion is granted."

and who, on March 31, 1939, ordered:

> "That the period of probation of the defendant Harold Van Riper having terminated, he is hereby discharged from any and all further supervision by the probation officer of this Court."

Said order was duly filed, the Government did not appeal it, it never has been vacated and it is *res judicata.*

Therefore, after March 31, 1939, at the latest, petitioner was free of the conditions of probation and subject only to indictment and trial by jury under the Constitution, the statutes and the rules of evidence for infractions of the law of the land. This is emphasized by the fact that under the Probation Act the court "may issue a warrant and cause the defendant to be arrested and brought before the court" only within the probation period or "after the probation period, but within the maximum period for which the defendant might originally have been sentenced." As shown above, the sentence of June 30, 1932, was a definitely imposed final judgment, it was single, and, the litigation having been terminated by such final judgment, it represented the maximum period for which petitioner ever could be sentenced in that litigation. As Judge Hulbert held, that period had terminated prior to March 31, 1939.

May 8, 1939, long after the termination of the five year periods of the probation and the sentence, execution of

which had been suspended; and after Judge Hulbert's said formal order discharging petitioner on the basis of such terminations, Judge Knox exceeded his power and issued the warrant for petitioner's arrest for alleged violation of said expired probation, which is the subject of petitioner's present attack. Said warrant was based upon a petition, also dated May 8, 1939, which did not mention petitioner's previous discharge from probation by Judge Hulbert.

Petitioner immediately surrendered voluntarily and moved to dismiss the proceeding (R. 31) as barred by his said formal discharge from probation by Judge Hulbert on the basis of the previous termination of the probation period and the period of the sentence, execution of which had been suspended. Judge Knox, however, denied that motion (R. 39), citing *U. S.* v. *Moore*, C. C. A. 2, January 16, 1939, 101 F. (2d) 56, as binding upon him. Here we have one judge of a District Court utterly disregarding a previous solemn, valid order duly made by another judge of the same court. If respondent questioned the legality of Judge Hulbert's said order discharging petitioner, its remedy was by an orderly, timely appeal to an appellate court, not by an unauthorized proceeding before another judge of concurrent jurisdiction. Petitioner himself had previously called Judge Hulbert's attention to the *Moore* case when he moved for his formal discharge from probation (R. 17-18), and Judge Hulbert discharged him despite the *Moore* case.

There is only a surface similarity between the *Moore* case and the instant one. The *Moore* record shows that it dealt largely with the question as to whether or not His Honor, Mr. Justice Van Devanter, had the right to sit in the District Court. It shows that the *Moore* sentence, execution of which was suspended, did not specify the date it was to commence, and, if that was to occur at the termination of a prior sentence under another indictment which Moore then was serving, then "the maximum period for

which the defendant might originally have been sentenced" under the imposed judgment had not terminated when the probation revocation proceedings were instituted against Moore. Further, Moore had never begun to serve any portion of the imposed sentence which fixed probation, and, therefore, the doctrine established by *Ex parte Lange, supra,* might not apply, and jurisdiction over the sentence may have remained with the court. Still further, Moore had not been formally discharged from probation by the court as was petitioner in the instant case. (This Court denied certiorari in the *Moore* case, 306 U. S. 664.)

Any other reasoning throws the decision of the court below in the *Moore* case into open and direct conflict with the decision of this Court in *Berman* v. *U. S.*, 302 U. S. 211, 212, and of the Fourth Circuit Court of Appeals in *Birnbaum* v. *U. S.*, 107 F. (2d) 885, 886, quoted above. The *Birnbaum* case was decided nearly a year after the *Moore* case, with full knowledge of its implications, and follows the doctrine long established by this Court as applicable to cases such as the instant one.

The petition for certiorari herein cites unimpeachable authority for the proposition that sentence once imposed is the judgment, final and inviolable. Respondent has attempted to meet this by arguing that certain final judgments are final for purposes of appeal, but not as to the rights of the parties, which gives us the absurdity of judgments that are final, more final and most final.

Respondent has contended that the period within which petitioner can be arrested under Section 2 of the Probation Act is the maximum consecutive periods for which he could originally have been sentenced under counts nine to sixteen of Indictment C-88/665, to-wit, 40 years. This might possibly be true if the court had suspended *imposition* of petitioner's sentence under said counts, because then the case might have remained open and pending on the docket

of the court until concluded by sentence, *Miller* v. *Aderhold*, 288 U. S. 206, 210.

The court, however, did not suspend imposition of sentence—on the contrary, it definitely *imposed* concurrent five year sentences under each and every one of said counts, and merely *suspended execution* thereof.

Said imposed sentence was a final judgment, and suspending its execution and placing petitioner on probation did not alter its finality. *Berman* v. *U. S., supra.* It was part of a single sentence which provided for prior imprisonment. Petitioner was incarcerated thereunder and the District Court's jurisdiction over the sentence ended June 30, 1932, except for the enforcement of its specific terms, *Ex parte Lange, supra.*

In other words, the consequences of the counts of that indictment were merged into a single sentence calling for a 3 year period of imprisonment to be served, and a consecutive period of five years imprisonment to be served only if petitioner were arrested with or without warrant within the probation period; or, upon warrant, "at any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced". This must limit the right to arrest to the period for which he could have been incarcerated under the final judgment as entered. It cannot mean that he may be arrested at any time within the period for which he might have been sentenced under the statute and the indictment before the final judgment, irrespective of the final judgment entered, and thereupon be given a new and additional sentence.

The Government claims that despite the judgment of conviction herein, and it is sustained, that after the expiration of probation, and even after the expiration of the period of sentence under the judgment, the defendant may be arrested at any time within the period in which he might have been sentenced to incarceration under the statute and the indictment, and be sentenced anew.

If such is the law, instead of realizing the assurance that he would be free after the expiration of the probation and the sentence, execution of which was suspended, he now finds himself subject to arrest and incarceration for a period, in this case, extending way beyond the period of sentence under the judgment.

Such is certainly not the law.

Before the judgment the defendant might have been sentenced upon conviction to numerous periods of time, but when the judgment was entered, that established a finality of the time for his arrest or incarceration to the period specified therein.

The statute does not authorize the court to go behind the judgment. The judgment determines the time of defendant's incarceration and the right of the court to pursue him. The statute does not confer upon the court the right to ignore the time limited by the original judgment and to proceed to impose a new judgment on top thereof.

As shown, on March 31, 1939, Judge Hulbert made a formal order discharging petitioner from probation on the basis of a finding that said periods of probation and sentence had previously terminated. Thereafter, on May 8, 1939, Judge Knox exceeded his power, disregarded said order of discharge and ordered petitioner's arrest in the instant proceeding.

On October 9, 1939, although there had been established against petitioner no act involving moral turpitude or crime, and although he had no power to alter or vacate the imposed sentence of June 30, 1932, Judge Knox (R. 261) resentenced petitioner:

> "For and during the term of Count 9—Eighteen (18) months. Five (5) years on each of counts 10-11-12-13-14-15 and 16 to run concurrently with each other and suspended. Probation for five years to begin at the expiration of sentence on Count 9."

In other words, instead of enforcing the remainder of the originally imposed sentence, execution of which had been suspended, it is imposing a new and additional sentence after the termination of the period of that original sentence, and imposing a new and additional five-year period of probation after the complete service and expiration of the originally imposed five years of probation.

The Probation Act does not permit the maximum period of probation to exceed five years under any sentence (18 U. S. C. 724 as construed by *Burns* v. *U. S.*, 287 U. S. 216). The statute under which counts nine to sixteen were found, 18 U. S. C. 232, does not permit a maximum sentence of more than five years imprisonment.

Neither the sentence of June 30, 1932, nor the sentence of October 9, 1939, has been vacated, they represent double punishment for single offenses, and the situation is pregnant with the very evil which this Honorable Court sought to avoid by its decisions in *Ex parte Lange*, 18 Wall. 163 and *Berman* v. *U. S.*, 302 U. S. 211.

The decision of the court below affirming same is in direct and open conflict with said decisions of this Court and the decision of the Fourth Circuit Court of Appeals in *Birnbaum* v. *U. S.*, 107 F. (2) 885, 886. The facts of the instant case also differ materially with those in the *Moore* case, *supra*. Unless this Court sees fit to intervene, this petitioner will be subject not only to execution of the unlawful sentence herein, but, in addition, to arrest without indictment and trial without jury and benefit of the rules of evidence, for acts which are not crimes, for forty (40) years—more than his life expectancy.

This petition for rehearing is made in good faith and not for purposes of delay.

WHEREFORE, petitioner respectfully prays that this Honorable Court grant this petition for rehearing of his petition

for certiorari, that it grant the prayer of that petition, and that it stay execution of the unlawful judgment complained of inasmuch as his incarceration thereunder is imminent.

And he will ever pray.

Respectfully submitted,

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Dated New York, N. Y., December 6, 1940.